The constitutional question was raised in the Court of Errors and Appeals by the Assignments of Error annexed to the petition and contained on pages 80 to 85 of the record. The allegation is that the defendant was deprived of certain rights to which she was entitled by the law of the land. This is stated in varying forms through twenty-five assignments.

It is so well settled as to be considered elementary law that the term "by the law of the land" means "due process of law."

Amer. and Eng. Encyc. of Law, 2d Ed., Vol. 10, p. 290.

Judge Harlan in Hurtads vs. California, 110 U. S., 543.

SUPREME COURT OF THE UNITED STATES.

ANNA VALENTINA, APPELLANT,

vs.

JAMES W. MERCER, SHERIFF OF BERGEN COUNTY, NEW JERSEY, RESPONDENT.

ON APPEAL. BRIEF.

SYNOPSIS OF EVENTS.

ANNA VALENTINA was indicted by the grand jury of the County of Bergen, State of New Jersey, April Term, 1904 (p. 75) for the murder, on March the 10th, 1904, of Rosa Salza.

She was arraigned on the indictment in the Bergen Oyer and Terminer, April 11th, 1904, and pleaded not guilty, and counsel was assigned her by the Court (p. 6). Two days later, April 13th, 1904, she was put upon her trial (p. 27). Verdict was that she was guilty of murder in the First Degree (p. 75). Three days later, April 16, 1904, she was sentenced to be hung May 19th, 1904 (p. 6).

A petition to the Court of Pardons of New Jersey for commutation of the sentence of death (p. 7) was prepared and presented by her former counsel. A Writ of Error was issued by JAMES M. TRIMBLE out of the highest Court of New Jersey, the Court of Errors and Appeals (p. 78).

Errors were duly assigned (pp. 80-85) thereon and were duly overruled (71 N. J. Law Rep., 552). And appellant was again sentenced to death April 4th, 1905 (p. 5) to be hanged May 12th, 1905.

A petition for a writ of Habeas Corpus was presented to the Circuit Court of the United States for the District of New Jersey (p. 1).

The writ of Habeas Corpus was refused May 9th, 1905, by Honorable W. M. MANNING, Judge (p. 86).

From this refusal an appeal was taken and allowed by Judge MANNING (p. 88).

Claims of Appellant.

Appellant claims that the State of New Jersey is about to deprive her, Anna Valentina, of her life without due process of law, and that it denies to her the equal protection of the laws, in violation of the Fourteenth Amendment of the Constitution of the United States, and of Article III of the Treaty between the United States of America and the Kingdom of Italy (page 11).

Under the Constitution of the State, and the treaty of the United States with Italy, she was entitled to "a trial by an impartial jury."

Art. I, Subdivision 8, N. J. Constitution.

Appellant claims that the *extraordinary proceeding*, which resulted in her conviction and sentence to death, did not constitute a trial by jury in any proper or legal meaning of that term, because a trial by jury is a judicial proceeding wherein, on a plea of *not guilty*, there is, in theory of law at least, the possibility of an acquittal, and the question of the defendant's guilt or innocence of *any* crime embraced in the Indictment, is submitted to the jury, who, *after* determining *that* question against defendant, are authorized, and then only to determine the *grade* of the offence (N. J. P. L. 1898, pp. 824-825), whereas, in this case, the question of the guilt of defendant was settled for them, and all that was submitted by counsel for the defense and by the Court to the jury was, the question of what degree of the crime of murder was the defendant guilty of.

In support of this allegation we shall show:

First. That the counsel for the defence (selected and appointed by the Court) conceived of the proceedings as a mere inquiry to determine the degree of the crime of which appellant was guilty, and so told the jury in his opening for the defence.

Second. That this erroneous conception of counsel as to the object and purpose of the proceeding, was not only not dissented from or corrected by the Court, but was commended and adopted by it in its charge to the jury.

Third. That the only question actually submitted by the

Court to the jury to decide was, whether this defendant was guilty of murder in the first degree, the Court adding, that, if not guilty of murder in the first degree, then by the *admitted facts*, she was guilty of murder in the second degree, and it was the jury's duty to say so.

We submit that a mere inquiry to determine the degree of crime is not a trial.

Noll 164
People vs. ~~Mers~~, 20 Cal., ~~184~~.

We claim that to submit to a jury the question of a person's guilt of murder in the first degree without submitting the possibility of acquittal of any degree; to submit to the jury only alternative propositions of guilt in one degree or other is not a *trial*, because the plea of not guilty is belied, and there is no issue for the defendant, and consequently the proceeding is not a *trial*. And we assert that such a proceeding is unknown to the Common Law and is not authorized by any statute of the State of New Jersey at the present time.

Section 68 of the Criminal Procedure Act 1874, which was considered by this Court in the case of Hallenger vs. Davis, 146 U. S., 314, and which formerly authorized the Court to accept a *plea of guilty* of murder and then to proceed by the examination of witnesses to determine the degree of the crime was abolished by the amendment to the Criminal Procedure Act, March, 1893, and such a provision does not form any part of the present act.

Rev., 1898; P. L., 1898; P. 825.

It follows, therefore, that the appellant did not have a trial as guaranteed to her by the Constitution of New Jersey, by the Fourteenth Amendment of the Constitution of the United States, and by the treaty with her country; and that the Court had no jurisdiction to entertain such a proceeding, give judgment thereon, and sentence to death.

II.

It appears from the record that this appellant spoke Italian, and that, in these proceedings, miscalled her trial, she was examined through an interpreter. It necessarily appears,

therefore, by a fair and reasonable inference, that she did not understand English. It also appears negatively, from the record, that nothing that was said in English by witnesses or her counsel against her, was translated to her.

We claim, that the failure to make known to her the proceedings at her trial, was a violation of the Constitutional requirements that she be informed of the nature and cause of the accusation and that she be confronted with the witnesses against her. But, above all, we claim, that when the Court of Errors and Appeals of the State of New Jersey in reviewing her case (71 N. J. Law Rep., 552) ignores these facts and imputes to her the same necessity of making requests to contradict and correct unproved material statements made in the course of the trial against her, as though she understood and spoke the English language; that said Court discriminates against her and denies her the equal protection of the laws.

III.

We are not here to correct mere errors of law, but to invoke the protection of Constitutional guarantees, which have been ignored and rejected by the State of New Jersey, through its tribunals, and without which their judgments are valueless as violating that higher law of which this Court is the guarantor.

If we sustain our contention the remedy in this Court by Habeas Corpus appears to be ample.

An unconstitutional conviction and punishment under a valid law is as violative of a person's constitutional rights as a conviction and punishment under an unconstitutional law.

The rule is well established that the Writ of Habeas Corpus cannot be used as a mere writ of error. But to deny a prisoner a constitutional right is not mere error in law, and where the record presents such a case the party is entitled to be discharged from imprisonment.

In re Nielson, 131 U. S., 184; 9 Sup. Ct. Rep., 672.

The question *In Re Converse* was whether petitioner had been denied equal protection of the laws. The Court *concedes* that an unconstitutional conviction and punishment under a valid law would be as violative of a person's constitutional

rights as a conviction and punishment under an unconstitutional law (*In Re* Converse, 137 U. S. P., 24; 2 Sup. Ct. Rep., 193).

POINT I.

The proceedings which resulted in appellant's sentence to death was not a trial at Common Law or a proceeding authorized by statute. It was a mere inquiry to determine the degree of murder of which defendant was guilty; it being assumed, certainly by counsel, and apparently by the Court, that at some time anterior to the trial, to wit, at her arraignment, said Anna Valentina "had confessed to the commission of this crime" (of which there was no proof before the Court and jury) and that all that remained for the jury was to determine what degree of murder she was guilty of. This is evident from the opening of counsel for the defense, from the certificate of the Presiding Justice, and from the charge of the Court.

It is unquestionable that counsel for the defense understood and conceived of the proceedings as a mere inquiry, because he so told the jury in his opening.

First. As to the statement of defendant's counsel to the jury.

"This defendant *when arraigned in open Court made* confession of the commission of this crime, and you, gentlemen of the jury, from the evidence that has been produced on the part of the State, and which shall be offered on the part of the defense, will simply have to determine *what the degree of guilt shall be*," that is, as he proceeds to further explain, their verdict will be murder in the *first or second* degree (p. 59).

As a further illustration of the condition of counsel's mind upon this question perhaps we may refer to the statement made in his petition to the Court of Pardons of New Jersey, to wit, "Your petitioner further shows that when arraigned before the Court to plead to the indictment found against her, she pleaded guilty, but, under the direction of the Court, a plea of not guilty was entered so that evidence might be taken for the purpose of determining the degree of guilt" (p. 7). The

utter illegality of this course does not appear to have struck counsel for the defendant. The expression "Confession in open Court" and "determine the degree of guilt" would appear to have been taken from Section 68 of the Act for the Punishment of Crimes, Approved March 22, 1878, Rev. 1874, p. 239, which provided "if such person (*i. e.* one indicted for murder) shall be convicted on confessions in open Court, the Court shall proceed by examining the witnesses to determine the degree of crime." But that provision of the Criminal Law of New Jersey was not the law of the State at the time of this trial. Rev. of 1898, the Crimes Act, Public Laws 1898, page 825.

Second. The certificate of the Presiding Justice also shows that counsel was laboring under this misconception, because it certifies that counsel for the defendant, in closing, "*conceded* that the evidence showed the defendant to be guilty of murder in the second degree, but insisted that she should not be found guilty of murder in the first degree" (p. 68).

That counsel acted upon this misconception and interposed no defense, claimed the benefit of no presumption, prayed no exception, is evident from the record.

Third. Not only did the Court fail to correct this erroneous impression of counsel for defendant, but, in submitting the question to be determined the Presiding Justice apparently approved and adopted this mistaken view of counsel, because the Justice said: "The only *question left for your consideration* is whether it is murder in the first degree or murder in the second degree, and so the learned counsel for the defendant *frankly and properly stated* in his opening and in his closing address before you" (p. 70).

Again the Court says: "It is admitted, for reasons already mentioned, that defendant is guilty of murder in the second degree" (p. 70).

Again the Court says: "From all this it results, as a necessary *conclusion of law* upon the admitted facts in this case, that the defendant is guilty of the crime of murder."

Three times the Judge tells the jury that by admission, or by admitted facts, she is guilty of murder. Twice he tells them that reasonable doubt only applies to the question of whether she is guilty of murder in the first degree or not.

SUPPLEMENTAL LEAF BETWEEN PAGES 6 AND 7 OF APPELLANT'S BRIEF

Let us reflect for a moment on the extraordinary proposition contained in these quotations from the judge's charge. "In this case it is admitted * * * that the defendant is guilty of murder in the second degree, and *that* will be your verdict, unless the evidence has satisfied you, etc." The jury is directed to consider the evidence, but if on the evidence they fail to find the defendant guilty of murder in the first degree, then "by the admitted facts" she is guilty of murder in the second degree, and "*that* will be your verdict," or, as it is put subsequently, "it will be your duty to say so."

That is to say in effect, if the evidence fails to satisfy the jury of this defendant's guilt of murder in the highest degree, then their discretion ceases; they are bound by "the admitted facts;" they become a mere machine to register and repeat what had already been decided upon by counsel and Court.

Even if the evidence convinced the jury that the right verdict would be an acquittal on the ground of self-defense, as defendant claims in her testimony, or manslaughter, yet they could not return such a verdict, because of the instruction of the Court. And they are placed in this position by the Court in the face of a statute which says in so many words, there shall be no distinction of treatment between those who offer to plead guilty of murder, and those who strenuously maintain their innocence.

And again, in closing his charge, the Court said: "If she did, she is guilty of murder in the first degree, and it is your duty to say so by your verdict. If not, then on the admitted facts of the case, she is guilty of murder in the second degree, and it is your duty to say so in your verdict" (p. 75).

By this peremptory direction the Court estops the defendant from the benefit of her plea of "not guilty," from the possibility of an acquittal, and presents to the jury simply an alternative of verdicts of guilty.

Where is there any authority of law for the exercise of the Court of such power as this?

Certainly it cannot be said that there is any authority for the procedure followed in this case in the language of the existing statute. By the Amendment of March 1, 1893, it was enacted: "If, upon arraignment, such plea of guilty shall be offered, it shall be disregarded, and a plea of not guilty entered, and a jury impanelled shall try the case in manner aforesaid.

On the contrary, the peremptory direction to the jury that they must find the defendant guilty of murder in one degree or the other, was a plain violation of the specific terms of the present statute, because that statute says that the jury shall designate by their verdict whether it shall be murder in the first or second degree, *if they* find such person guilty."

Revised Statutes, page 1100, Sec. 271.

Revision 1898, P. L. 1898, pages 824 and 825. By this Amendment it has been held that the Common Law right of confession in open Court of a crime of murder was abolished, and the statute substituted for the advice of the Judge the mandate of the law that the citizen shall not be adjudged to death upon his own confession, but that *in favorem vitae* the State shall prove in all respects to the satisfaction of a jury the crime laid in the indictment.

State vs. Genz, 28 Vr., 463.

By this statute all cases of murder were put on the same plane. The same plea was fitted to all cases and the same procedure required in every instance. No power was given to the Court to differentiate cases of murder one from the other: no power to distinguish between cases where the

accused offered a plea of guilty or where the plea of not guilty was pleaded as usual. In both cases the accused stands in exactly the same position before the Court. All defences are available in the one case as in the other (insanity, self defense, alibi, &c.), and with the same result equally open to one as to the other, to wit, acquittal, manslaughter or murder in the second or first degree. In this case counsel for defense withheld, and the Court excluded all of the above possibilities except conviction—conviction of murder in one or the other degree. If this is possible in this case it is possible in any case of murder when the Judge sees fit, and it is therefore tantamount to the absolute abolition of trial by jury.

Nor is there any such power in the Judge at common law.

The plea of not guilty traversed every material fact alleged in the indictment.

3 Greenleaf Evidence, Part 5, Sec. 12.

Under the indictment of this case there could have been a conviction of any grade of manslaughter established by the evidence, and the defendant could only be convicted of that degree of crime which the evidence established beyond reasonable doubt.

Charge of Judge Magie in Wilson vs. State, 31 Vr., p. 172.

This is merely declaratory of the Common Law.

Roscoe's Criminal Evidence, p. 82.

Appellant was entitled to the presumption of innocence and reasonable doubt on the whole case, and not on a part thereof.

3 Greenleaf Evidence, Part 5, Sec. 29.

In this case the application of reasonable doubt was limited by the Court to the question whether appellant was guilty of murder in the first degree (p. 70).

We have been unable to find any other case at Common Law, in which the Judge presiding at the trial arrogated to himself the power of instructing the jury that they must bring in a verdict of conviction, and conviction of one of the grades of murder.

Thirty years of the practice of law, in which the undersigned have heard innumerable criminal cases, we cannot recall a single instance where a Judge, amongst them that illustrious Judge the Hon. David A. Depue, deceased, ever failed to say to the jury, the guilt of the defendant must be proved beyond a reasonable doubt. Reasonable doubt implies the possibility of acquittal.

3 Greenleaf, Part 5, Sec. 29, 15 Edition, Notes,

So that when the Judge in this case limited the exercise of reasonable doubt to the first degree of murder, exclusively he prevented the jury from considering even in theory, the possibility of acquittal and deprived without sanction of law the proceeding of its most important and characteristic feature as a criminal trial. This is not mere error. This is arbitrary authority; and it matters not how plain the evidence may be the Court is not thereby justified in assuming a disputed fact.

Wells' Questions of Law and Fact, Chap. 10, Sec. 466.

The foregoing conspicuous features of this case differentiate it from all others that we have known. We are not endeavoring to present isolated errors of law. We contend that, viewed as an entirety, the actions of counsel and of Court form a harmonious whole dovetailed into each other—one and inseparable:—and from the opening of counsel for the defence, to the close of the Court's charge, they constitute a course of procedure in a capital case for which there is no authority of law. We know of no precedent where on a plea of not guilty in a case of murder the Presiding Judge has presented to the jury only alternatives of conviction, absolutely withdrawing the possibility of any acquittal.

It is stated in the decision of this case by the Court of Errors and Appeals of the State of New Jersey, 71 N. J. Law Reports, 533, that the chief complaint made on the Writ of Error sued out of that Court on behalf of the present appellant, "was that, at the trial, it was assumed by her counsel, the Court, and the jury, that she was guilty of murder, and that that allegation was far from the truth."

It is submitted that the allegation of the appellant is borne out by the record of the case.

In the first place the chief point in that Court, as we have striven to make it here, was not the assumption of appellant's guilt by anybody; that was a mere incident, a necessary sequence of the illegal course of procedure adopted. The main point was and is, that the entire course of procedure adopted at this alleged trial was arbitrary, unjust and without authority of law.

In the second place it is submitted that the statements of counsel and of the Court in the conduct of the case, bear out the appellant's allegation.

Did not counsel for the defence "assume" the guilt of his client of murder when he told the jury in his opening for the defence, page 59, before his client had been sworn, that the only question for them to determine, was what the degree of guilt should be, whether it should be murder in the first or murder in the second degree? Did not that remark necessarily imply her guilt of some degree of murder? And when he avowedly based this statement, not on testimony which had already been given at the trial, but on something not proven, something he alleged to have taken place several days before, some unproved confession of the commission of this crime, did he not "*assume*" the guilt of his client?

When the Judge charged the jury that it (p. 59) "results as a necessary conclusion of law upon the admitted facts in this case that the defendant was guilty of the crime of murder," and when he told the jury at the end of his charge (p. 75) "that on the admitted facts of the case she is guilty of murder in the second degree, and it is your duty to say that by your verdict," did he not "assume" her guilty of murder? He assumed her guilty of murder, because he had no authority to find the fact; that finding was exclusively within the province of the jury. He assumed it, because he expressly adopts the assumption of counsel in the latter's opening address. "And the only question left open for your consideration (the jury) is whether it is murder in the first degree or murder in the second degree. And so the learned counsel for the defendant frankly and properly stated in his opening and in his closing address before you." And when the jury assumed the function of determining the mere grade of the offence, as they had been instructed by both counsel and Court to do, did they not assume as a postulate her guilt of the crime of murder?

We did not mean to say, nor do we mean to be understood as saying that there was not evidence in the case, after defendant had been sworn, from which the crime of murder might have been inferred. But we do mean to be understood, however, as saying, that there is no evidence in the case, in our opinion, which necessarily justifies a verdict of *wilful, deliberate and premeditated* murder. The merits of that controversy are not before this Court. Guilty or not guilty, she is equally entitled to a trial by the law of the land. The uncontradicted evidence of the appellant, however, shows that she entered the home of the deceased, at the deceased's invitation, unarmed and with "peace in her heart;" that deceased met her with abuse and threats; that a quarrel ensued, in which she wrested the knife from deceased and "a veil fell before her eyes," and she killed her tormentor. Certainly not necessarily a case of murder in the first degree. It was a crime of impulse by great provocation, in no sense proved to have been premeditated and utterly without that appreciable space of time which is essential to wilful and premeditated murder.

State vs. Bonofiglio, 67 N. J. Law Reports, 244.

No matter what the guilt may be, no matter what the horror which the deed may be excited in us, no matter what the evidence may lead us to think, the accused is yet entitled to be tried by the law of the land.

POINT II.

4th, 5th and 7th Assignments.

When defendant's counsel told the jury that "this defendant, when arraigned in open Court, made confession of the commission of this crime," he must have referred, if to anything at all, to something *dehors* the record, for there is no such confession in the record, nor any testimony of any such confession ever having been made to anyone.

['The record of the arraignment is found on page 6, and took place on the 11th of April, 1904, the alleged trial taking place on the 13th (p. 27).] *Non-apparet non-constat.*

Counsel, therefore, had no right to refer to it. Having done so, however, what became the duty of the Court in re-

spect to it? Here is an unsworn statement of fact, presented to the jury in the guise of an opening in a capital case, which is prejudicial, if not fatal, to defendant's case; an admission against her interest that is unnecessary, and unsupported in the evidence. We submit that it became the duty of the Court *ex debito judiciæ*, to correct this uncalled for misstatement of counsel, and to recall the unfounded admission from the consideration of the jury. If the Court failed to do this; if, as in this case, the Court not only failed to correct the misstatement, but endorsed it, adopted it, and impressed it upon the jury, by complimenting the counsel on the course that he pursued (p. 70), then, we submit, it becomes not only assignable error, but a violation of Constitutional rights as well.

In answer to this position the Court of Errors and Appeals of New Jersey has replied, partly, as follows: "I know of no rule either at the Common Law or created by statute which required the Judge presiding at a criminal trial to restrain the defendant's counsel from making such admission as to the guilt of his client as he may think proper."

The appellant submits that this is a most extraordinary statement—extraordinary, first, because it observes no distinction between an ordinary criminal and a capital case. It treats them as synonymous terms, whereas there is a world of difference between all other criminal trials and a capital case.

[It must not be forgotten that this defendant did not speak or understand the language in which these proceedings were carried on; that she stood silent and helpless in this court-room, unappreciative of all that took place, with the question of life and death absolutely confided to her counsel and Court.] We say, that this statement of the Court of Errors is extraordinary in another particular. It is submitted that said statement is not a correct exposition of the Common Law, and we desire to contrast it with a decision of an Illinois case on a similar question of permitting an unsworn statement to go to the jury as evidence. "In capital cases," says that Court, "every feeling of humanity as well as the principles of justice, require that the accused should have a fair and impartial trial. In such trials the essential forms of the law adopted and adhered to for the purpose of protecting the citizen in his rights, must be observed. And one of those re-

quirements coeval with the Common Law itself is that the people's witnesses in all criminal proceedings must be sworn before they can give testimony. To permit bystanders to give testimony not under the sanction of an oath, is not only contrary to our sense of justice in any case, but the mind is shocked when such evidence is given against the accused in a capital case. Human life cannot be sported with in this manner. To permit it would be to place the life of the accused at the mercy of the unscrupulous actuated by we know not what feelings of prejudice, passion or malignity, without the fear of punishment in this life or in the future of the crime of perjury. Such evidence has never been, and, we presume, never will be sanctioned by the laws of a civilized and Christian people.

"It may be urged that this testimony was unimportant, and could not have worked any injury to the plaintiff in error. Who can say what influence it may have had upon the mind of the jury? We presume neither they nor any one else could tell.

"It may be urged that the error was waived, inasmuch as the statement was not objected to by the accused. It is an ancient maxim of the law that in capital cases the accused stands upon all his rights, and waives nothing. He then could not be prejudiced by *failing to object to* the introduction of this evidence. And the same may be said as an answer to the fact that he did not move to have it excluded from the jury. It is the province of the Judge trying the accused to see that he has a fair and impartial trial, and if within his power he should have prevented the statement from being made, and if that could not be done, then he should have, on his own motion, excluded it from the jury."

Dempsey, Jr., vs. The People, 47 Illinois, 324.

Contrast with this the Syllabus of the N. J. decision.

"If at the trial of a person for murder the counsel of the defendant in opening the defence, states to the jury that the defendant when arraigned in open Court, made confession of the commission of the crime, it is not error for the Court to refrain from contradicting the statement when such a conviction is not requested."

According to the Illinois decision, the accused in a murder case waives no rights by silence; a request is unnecessary; the duty of protecting his rights is inherent in the judicial office itself. According to the New Jersey decision in this case the accused in a murder trial waives what he does not claim, and a request must precede the interference on his behalf of the Court, even though the accused does not understand the English language.

The Illinois case refers to an unsworn statement of a bystander permitted to go to the jury in a murder case. This case refers to the unsworn statement of the attorney that his client had confessed to the commission of murder. It is infinitely stronger than the Illinois case. It has been decided by the Supreme Court of New Jersey that the present law, N. J. Rev., 1898, Criminal Act, Public Laws 1898, page 825, has abolished what Chief-Justice BEASLEY called the common law right of confession of murder.

State vs. Genz, 28 Vr., 459.

Now, here is an agent, an attorney, permitted by the Court to do what his principal could not, from reasons of public policy, do herself. This cannot be. The fountain can rise no higher than its source; and certainly a confession of the commission of murder which she is prohibited by law from making is beyond the scope of authority of her agent to admit; and when he traveled beyond the scope of his authority the Court ought to have interposed and stopped him. In this same connection the opinion of the Court of Errors goes on: "I know of no authority possessed by this Court sitting in review to animadvert on the discretion which the trial Court, if not *asked* to interpose, might exercise on such an occasion. The only authority given by the statute for such a review is when the defendant in a criminal trial has suffered manifest wrong in the denial of any matter by the Court which was a matter of discretion."

P. L. 1898, p. 915, Sec. 136.

"In this statute denial implies request, and in the trial now under consideration nothing was requested and hence nothing was denied." So that, as we understand this decision of the Court of Errors and Appeals, the defendant (Appellant here)

should have requested the Presiding Judge to have contradicted the unwarranted statement of her counsel in his opening to the jury; otherwise the appellate tribunal cannot help her. This woman who did not understand what her counsel said; this woman who was examined through an interpreter; to whom, as the record shows, the interpreter translated nothing but the questions that were asked her, ought to have requested the Presiding Judge to correct what she did not understand, and not having done so, she must undergo her sentence to death! Here is a Court which insists on the *deaf* hearing, and the dumb speaking. This is not error: this is a denial of the fundamental principles of justice. Contrast with this Gardner People, 106 Ills. p. 76

She is placed in the same position as an American citizen would be placed if, travelling in some foreign country whose language he did not understand, he were to be defended by some local attorney who, in the course of legal proceedings conducted in a foreign tongue, were to make unwarranted and highly prejudicial admissions of whose purport the prisoner, on trial for his life, were wholly ignorant. Would not the defendant, in such case, be warranted in invoking the aid and interposition of the American government?

If it be said that this decision of New Jersey Court of Errors and Appeals, no matter how inconsistent it may be with the Common Law as expounded elsewhere, is binding upon this appellant, because she is a resident of New Jersey, and this is an authoritative exposition of the Common Law of the State by its highest tribunal; the answer is obvious. It is not binding upon her, because it is inconsistent with the principles of human justice.

If it be accepted as law in New Jersey, that the Court may without error refrain from contradicting or correcting the unproved statement of counsel for the defense, that his client has previously confessed the commission of this crime, unless the accused requests the Court to make such contradiction, then common sense and common justice thrusts upon the Presiding Justice another duty when the accused is a foreigner, speaking no English.

And in this case and all such cases, it became, and was the duty of the Court when this astounding admission was made, to have turned to the interpreter and directed him to translate

to the accused the statement of her counsel; PERHAPS THEN, after she fully understood the fatal import of what her counsel had told the jury, if she did not make such a request, the Court might properly refrain from interfering. Certainly not before.

Point III.

The Constitution of New Jersey provides that the accused shall be informed of the nature and cause of the accusation and shall be confronted with the witnesses against him (Art. 1, Subdiv. 8). It is submitted that "confronted" does not mean merely bodily presence; that the barrier of language is quite as great as the barrier of distance; and that in cases like the present one, where a foreigner, not speaking English, is on trial, this Constitutional provision is not satisfied, unless the testimony and proceedings are translated to the accused. An examination of the record will show that nothing was translated to this defendant, except specific questions.

When appellant was arraigned and when sentenced, the record does not show the presence of the interpreter and translation of the indictment and sentence (pages 5 and 6). We claim that the record should show *affirmatively* both these facts in each instance, and failing to do so, that it is fatally defective.

Nothing shows that she was present when verdict was rendered (p. 75). This is necessary.

Dougherty vs. Cour, 69 Pa. St., 286.

It further appears from the record that no testimony was translated to this accused; that the opening statement of her attorney (page 59), concerning which so much has been said, was not translated to her. The record must show affirmatively the presence of the accused at the trial and when the verdict is received and sentence pronounced (see cases quoted in ~~Dil~~ Cooley's ~~lon~~ Constitutional Limitations, Notes, 7th Edition, page 457. Subject: Confrontation. Dougherty against Commonwealth, 69 Pensylvania, 286). And if confrontation consists of something more than physical presence; if it involves, as we claim it does, the presence of the *mind* as well as the *body*, then we

SUPPLEMENTAL LEAF TO PAGE 16, AT CLOSE OF POINT II.

But whatever may be said as to the duty of the judge to have contradicted the unproved statement of alleged fact made by counsel for the defense in his opening [page 59] or to have called defendant's attention to the same through an interpreter, that after all is not the main point.

A trial is predicated upon sworn testimony, as the Illinois decision referred to, ~~says:~~ holds,

The counsel for the defense had no right to make this ~~im~~unproved statement of alleged fact, to wit, that his client a few days previously "had confessed the commission of this crime."

A fortiori the judge had no right to use this unwarranted and unproved statement of alleged fact *as a binding admission* against defendant, controlling the jury in their deliberations that she was guilty of murder, to wit, of murder in the second degree.

That the judge did use this statement as such an admission is evident from the quotations from his charge contained in this brief on page 6 under third.

It has been contended, and probably will be here, that I am mistaken in this assertion, and that when the Court used the expressions "admitted facts," "it is admitted," in his charge [pages 70, 75] these expressions referred only to the *evidence* adduced in Court, and did not refer to the unproved statements of counsel for the defense.

This is not so. It is obvious that when he used these phrases, "admitted facts," "it is admitted," he referred to something *outside the evidence*, and *that* something could only be the unwarranted and mistaken admission of counsel. The Court

draws a plain distinction between evidence and what he calls "admitted facts." He says in one place [page 70], "It is admitted * * * that the defendant is guilty of murder in the second degree, and *that will be your verdict*, unless the *evidence* has satisfied you beyond a reasonable doubt that the defendant intended to take Rosa Salza's life, etc."

Here one term, "it is admitted," is contrasted with the other, "evidence." Nothing could be plainer than that he used them as referring to distinct matters having distinct consequences. He maintains the same distinction between "evidence" and "admitted facts" in his very last words, referring to the fact that if the *evidence* satisfies the jury of certain facts that then defendant is guilty of murder in the first degree [page 75]; "if not then on *the admitted facts* of the case she is guilty of murder in the second degree, and it is your duty to say that by your verdict."

He adopts the unwarranted admission of counsel, and says [pages 69, 70]: "It results as a necessary conclusion of law upon the *admitted facts* in this case that the defendant is guilty of the crime of murder, and the only question left for your consideration is whether it is murder in the first degree or murder in the second degree. And *so* the learned counsel for the defendant frankly and properly stated in his *opening* and in his closing address before you."

What the "learned counsel" said in his opening address was inconsistent from my point of view with the duty of counsel. It was a statement of a confession of crime which the accused did not understand, which was not made known to her, against which she could not possibly protest, which was unproved and which I do not hesitate to say was never made. Speaking Italian as I do, familiar as I am with this defendant's story, I have no doubt that what is called "a confession of this crime" is a misinterpretation put upon her broken English when she delivered herself up at the prison immediately after committing the deed, or at her arraign-

ment, at which it does not appear that an interpreter was present.

The adoption of this illegal admission of counsel by the Court, as aforesaid, distinguishes this alleged trial from all precedent. It stands alone; it is unique; and when these facts are considered together with the other fact of such vast importance, to wit, that as a consequence of this illegal admission of counsel the judge excluded from the consideration of the jury the possibility of acquittal, and directed the jury peremptorily to one of two alternatives, it seems to me that I am justified in saying that these proceedings do not constitute a trial in the constitutional sense, that no verdict of a jury can condone it; that here is denial of fundamental right; that here is a case where the principles laid down by this Court in Caldwell vs. Texas, 137 U. S., 697, applies, to wit: "That no State can deprive particular persons of equal and impartial justice under the law. The power of the State * * * can not be sustained when special, partial and arbitrary."

The decision of the New Jersey Court of Errors and Appeals in this case is not directly involved in this appeal, and has been referred to only to satisfy a rational curiosity; and right here I desire to point out how that Court has misapprehended this point.

In the quotation hereinbefore made from that decision [page 12 of this brief] the judge has failed to perceive that the most serious feature of this misstatement of counsel was not the failure of the Court to contradict it, but its use, as I have set forth, by the Court to fasten conviction upon the defendant.

submit that it is quite as important that the record should affirmatively show that the proceedings and material parts of the testimony were made known by translation to the accused.

The object of requiring the prosecution to confront accused with the witnesses against him is not alone to enable him to view the witnesses while the latter are giving their testimony, but also, and chiefly, to acquaint the accused with the character of the testimony whereon a conviction is sought by the State. It is submitted that the object of this constitutional requirement is wholly defeated where the trial is so conducted that the accused is kept in ignorance of the testimony against him. And where the testimony is given and all the proceedings are conducted in a language with which the accused is wholly unfamiliar, as in this case, the defendant is placed in a position similar to that which she would occupy if the Court had permitted her to see but not to hear the witnesses upon the stand.

Suppose that the defendant in a capital case were placed, during the trial, in a compartment within the court-room wherein a glass door or partition enabled him to see all the witnesses but excluded all sound of their voices. Could he be said to have been confronted with the witnesses against him? And where a barrier of language instead of one of glass or wood is interposed between the witnesses and the accused, is the latter not as effectually shut out, in the one case as in the other, from the benefit of the Constitutional provision requiring the State to confront him with its witnesses?

Conclusion.

If the appellant ever offered to plead guilty of murder, of which there is no evidence, two courses lay open to the Court and prosecutor, either to accept the plea, in which case it would be entered as a plea of *non vulty* of murder in the second degree, and the accused rendered liable to thirty years imprisonment, or to refuse to accept it, in which case a plea of "*not guilty*" would be entered in all its fullness and entirety, without distinction or difference, opening the full range of possibilities from acquittal to death, which the plea of "*not guilty*" has

afforded heretofore to every prisoner on trial for murder. But neither one of these two courses was followed in this case. Instead, a third course was followed, which has, we contend, no sanction either in the statutes of the State or the Common Law, and is absolutely without precedent.

The formal plea of not guilty was entered for her, but Court and counsel curtailed and cut down its benefits. They held the accused down; they nailed her fast, so to speak, as though she had pleaded guilty of murder in the second degree; there was no escape for her from that—counsel and Court agreed on that—but the Court, while holding her fast, left the State free to pursue her for a still higher degree of crime. This was not a trial. It was the exercise of mere arbitrary power; and law is something more than mere will exerted as an act of power. It must not be a special rule for a particular case (Hurtado vs. Cal., 110 U. S., 535 §). To illustrate the difference between appellant's case and the class of cases in which this Court has refused to act, let us take Crossley vs. the State of California (18 Sup. Ct. Rep., 242).

"Two grounds were relied on as justifying the issue of the writ:

"First: That there was no evidence that he was guilty of murder in the first degree; that the evidence showed or tended to show, that he was guilty at most of murder in the second degree; that the Trial Court only submitted to the jury the question as to whether *or not* he was guilty of murder in the first degree. This was matter of error and with its disposition by the highest tribunal of the State, it was not within the province of the Circuit Court to interfere."

There the Trial Court narrowed the issue down to murder in the first degree, "*whether or not*" he was guilty of murder in the first degree; but the possibility of acquittal remained to the defendant; the issue was narrow, but acquittal was possible. But in the *Valentina* case there was no "whether or not." No possibility of acquittal was left the defendant; no issue was left to her; alternate degrees of *guilt* were alone submitted to the jury. She must be found guilty of this or guilty of that. Such a proceeding is no trial. For a trial must always contain in theory at least the possibility of acquittal. There is no comparison between the Crossley case and this.

We admit that the State has full control over the procedure in its Courts *subject only* to the qualifications that such procedure must not work a denial of fundamental rights, or conflict with specific and applicable provisions of the Federal Constitution (Brown vs. N. J., 175 U. S., 172; 20 Sup. Ct. Rep., 78). But here is denial of fundamental rights. Here is conflict with the specific and applicable provision of the Federal Constitution.

It is not alone the question of jurisdiction which may be inquired into in proceedings on Habeas Corpus.

Storti vs. Massachusetts, 22 Su. Ct. Rep., 73.

"Section 761, Revised Statute, provides as to Habeas Corpus cases that the Court, or Justice, or Judge shall proceed in a summary way to determine the facts of the case by hearing the testimony and arguments, and thereupon to dispose of the party as law and justice require.

"The command of the section is, 'to dispose of the party as law and justice require.' All the freedom of equity procedure is thus described; and substantial justice, promptly administered, is ever the rule in Habeas Corpus."

Storti vs. Massachusetts, 22 Sup. Ct. Rep., 73.

It is to the interest of the community that crime be punished. But in this case there is something greater than that, and that is the prevalence of law. It is of importance that the guilty shall not escape. It is of infinitely greater importance that no life shall be taken by the community except with strict conformity to the law of the land.

We ask, therefore, that the petition be granted that a writ of Habeas Corpus issue in accordance with this prayer.

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Of Counsel with
Appellant